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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/914,492	11/14/2001	Teresa Barbara Crook	CM2045F	8062

27752 7590 07/08/2004

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EXAMINER

WELLS, LAUREN Q

ART UNIT	PAPER NUMBER
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1617

DATE MAILED: 07/08/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

**Application No.**

09/914,492

**Applicant(s)**

CROOK ET AL.

**Examiner**

Lauren Q Wells

**Art Unit**

1617

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 24 March 2004.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-8 and 10-17 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-8, 10-17 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- ☐ Notice of References Cited (PTO-892)
- ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_.
- ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_.
- ☐ Notice of Informal Patent Application (PTO-152)
- ☐ Other: \_\_\_\_\_.

Art Unit: 1617

### **DETAILED ACTION**

Claims 1-8 and 10-17 are pending.

#### ***Response to Applicant's Arguments/Amendment***

The Applicant's arguments filed 3/24/04 to the rejection of claims 1-8, 10-17 made by the Examiner under 35 USC 103 have been fully considered and deemed not persuasive.

#### ***103 Rejection Maintained***

The rejection of claims 1-3 and 10-17 under 35 U.S.C. 103(a) as being unpatentable over Kimura et al. (US 5690916) in view of Dietz (6132873) and JP 57098205 (Pola abstract) and Bodeline-LeComte (5928652) is MAINTAINED for the reasons set forth in the Office Action mailed 9/30/03, and those found below.

The rejection of claims 4-6 under 35 U.S.C. 103(a) as being unpatentable over Kimura et al. (US 5690916) in view of Dietz (6132873) and JP 57098205 (Pola abstract) and Bodeline-LeComte (5928652), as applied to claims 1-3 and 10-17, and further in view of Mizugushi et al. (5520917) is MAINTAINED for the reasons set forth in the Office Action mailed 9/30/03, and those found below.

The rejection of claims 7 and 8 under 35 U.S.C. 103(a) as being unpatentable over Kimura et al. (US 5690916) in view of Dietz (6132873) and JP 57098205 (Pola abstract) and Bodeline-LeComte (5928652), and Mizugushi as applied to claims 1-6 and 10-17, and further in view of Mathur (4096240) is MAINTAINED for the reasons set forth in the Office Action mailed 9/30/03, and those found below.

Applicant argues, "These three component groups (i.e., a, b, and c of Kimura and the instant application) are not the same". This argument is not persuasive. First, it is respectfully

Art Unit: 1617

pointed out that the instant rejection is made over a combination of references. Thus, Kimura is not relied upon exclusively to teach all the limitations of the instant claims. Second, it is respectfully pointed out that the titanium coated mica of Kimura is “b” of the instant invention, the titanium dioxide treated with silicone is “c” of the instant invention, and the globular nylon powder is relied upon in combination with a secondary reference to teach “a” of the instant invention.

Applicant argues, “it would be understood by one of skill in the art that considerably less of these components is required by the compositions of the instant invention. . .in teaching the higher percentages, Kimura teaches away from the lower levels of the instant compositions. Improving performance while reducing material usage is a significant improvement”. This argument is not persuasive. First, it is respectfully pointed out that a significant improvement does not render a composition patentable. Second, as pointed out in the previous Office Action, differences in the concentration of the actives in general will not support the patentability of subject matter encompassed by the prior art unless there is evidence indicating such concentration is critical. See MPEP 2144.05. Thus, since the general conditions of the instant claims are disclosed in Kimura, one having ordinary skill in the art would have discovered the optimum or workable ranges by routine experimentation. Furthermore, lowering the amount of the interference pigments also is viewed as economically advantageous from the perspective of a manufacturer, or an obvious optimization to match the desired shade or intensity of the color. And lastly, in summary, it has been held that where the general conditions of a claim are disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art. In re Aller, 105 USPQ 233.

Art Unit: 1617

Applicant argues, "The nylon particles of Kimura are globular nylon particles. . .Applicants have determined that the spherical porous, organic powders of the present invention reduce the sticky/tacky feel brought on by the high levels of humectant and the use of niacinamide". This argument is not persuasive. It is again respectfully pointed out that the instant rejection is made over a combination of references. Thus, Kimura is not relied upon exclusively to teach all the limitations of the instant claims. In fact, Pola abstract and Bodelin-LeComte are relied upon to teach the spherical porous organic powders. Second, the instant argument is not commensurate in scope with the instant independent claims which do not recite niacinamide. Third, it is respectfully pointed out that Applicant has provided no data or unexpected results to substantiate the above statements. If Applicant is attempting to establish unexpected results, the Examiner respectfully directs Applicant to the guidelines for showing unexpected results. It is applicant's burden to demonstrate unexpected results over the closest prior art. See MPEP 716.02, also 716.02 (a) - (g). Furthermore, the unexpected results should be demonstrated with evidence that the differences in results are in fact unexpected and unobvious and of both statistical and practical significance. *Ex parte Gelles*, 22 USPQ2d 1318, 1319 (Bd. Pat. App. & Inter. 1992). Moreover, evidence as to any unexpected benefits must be "clear and convincing" *In re Lohr*, 137 USPQ 548 (CCPA 1963), and be of a scope reasonably commensurate with the scope of the subject matter claimed, *In re Linder*, 173 USPQ 356 (CCPA 1972).

Applicant asks, "What motivation is there in the secondary citations to combine their teachings with that of Kimura to add porous resin particles and to reduce the necessary levels of pigments and matting agent?". This argument is not persuasive. First, it is respectfully pointed

Art Unit: 1617

out that the instant rejection does not blindly add the porous resin particles to the composition of Kimura, but substitutes the porous resin particles for the globular resin particles taught by Kimura. See the above paragraphs for motivation to alter the percent weights of the ingredients of Kimura.

Applicant argues, "There is no guidance in Dietz of the levels of pigment required by cosmetic applications". This argument is not persuasive, as Dietz is not relied upon to teach levels of pigments. It is respectfully pointed out that Dietz is relied upon to teach interference pigments, wherein the titanium dioxide layer has a thickness of 120-160nm.

Regarding Pola, Applicant argues, "The majority of examples are pressed powders. The one example of a cosmetic cream utilizes no active ingredient such as niacinamide or high levels of humectant which would result in a sticky or tacky feel in the cream which is reduced by the use of the instant porous particulates. There is no contemplation either of the use of actives with the porous resins or of a reducing in sticky or tacky feel brought about by their use.

Additionally, the average particle size of the resin particles used in the cosmetic cream example of Pola is about 3 micrometers". This argument is not persuasive. First, it is respectfully pointed out that only the abstract of Pola was relied upon, since the reference is in Japanese. If Applicant has obtained a translation of the reference, the Examiner respectfully requests that Applicant provide the translation on a IDS. Second, as pointed out above, Applicant is arguing unexpected results, without providing any data. See above, for the guidelines for establishing unexpected results. Third, Applicant's arguments are again not commensurate in scope with the instant independent claims, which do not require niacinamide or humectant, and which do not limit the

Art Unit: 1617

form of the composition. Fourth, it is respectfully pointed out that the Pola abstract is relied upon to teach the benefits of utilizing porous powder resins in cosmetics.

Regarding, Bodeline-LeComte, Applicant argues, "There is no contemplation of water-in-oil or oil-in-water emulsions in Bodeline-LeComete. Therefore, there would be no motivation provided by a reading of Bodelin-LeComte to include organic particulates in emulsions or dispersions". This argument is not persuasive. First, the argument is not commensurate in scope, as the instant independent claims do not recite emulsions, let alone water-in-oil or oil-in-water emulsions. Second, Bodelien-LeComte is merely relied upon to teach the refractive index of porous organic particulate materials utilized in cosmetics.

Applicant argues, "The present invention contains from 0.1% to 15% of the active. As mentioned above, Applicants have determined that niacinamide when used in standard formulations gives rise to a sticky feel. The present invention alleviates this negative by using spherical porous organic particulate material with specific properties". This argument is not persuasive. Again, arguments over niacinamide are not commensurate in scope with the instant independent claims, and Applicant has not met the burden in establishing unexpected results, as outlined above.

### ***Conclusion***

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after

Art Unit: 1617

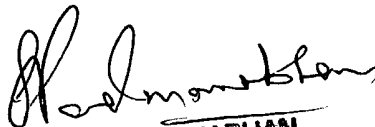
the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Lauren Q Wells whose telephone number is 571-272-0634. The examiner can normally be reached on M&R (5:30-4).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Sreeni Padmanabhan can be reached on 571-272-0629. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

lqw

  
SREENI PADMANABHAN  
SUPERVISORY PATENT EXAMINER